REMARKS

Applicant has carefully reviewed and considered the Office Action mailed on June 3, 2003, and the references cited therewith.

Claims 1, 7-9, and 13 were amended. Claims 15-19 are added. Claims 1-19 are now pending in this application.

§103 Rejection of the Claims

Claims 1, 4, 9-13 were rejected under 35 USC § 103(a) as being unpatentable over Faska et al. (US 2002/0008191). The rejection is respectfully traversed. Faska et al. does not show or suggest each and every element of the claimed invention. A prima facie case of obviousness has not been established.

Applicant respectfully traverses the single reference rejection under 35 U.S.C. § 103 since not all of the recited elements of the claims are found Faska et al. Since all the elements of the claim are not found in the reference, Applicant assumes that the Examiner is taking official notice of the missing elements. Applicant respectfully objects to the taking of official notice with a single reference obviousness rejection and, pursuant to M.P.E.P. § 2144.03, Applicant respectfully traverses the assertion of Official Notice and requests that the Examiner cite references in support of this position.

The Examiner admits that several elements are missing in Faska et al.: "Faske et al. fails to specifically disclose that the system is used to aid a driver of an automobile, or that it is used in a heads-up display for an automobile, or that the visible light pixels are adapted to be selective to colors encountered while driving,..." The Examiner however goes on to state that "given that it is used as a field vision system susceptible to different colors within the infrared and visible range, using it as an aid in an automobile is an obvious matter of design choice since it fulfills the same function, and since it is susceptible to different colors in the visible spectrum, it is obvious that it is susceptible to different colors that one encounters while driving.

This analysis is flawed in several respects. It uses the present application as a roadmap to modify Faske et al. It also mischaracterizes the claims, in that claims 1 and 4 specifically recite that traffic control colors are optimally sensed, not just "susceptible".

Functional language in the claims also appears to be ignored as indicated in the Response to Arguments. Applicant has amended claim 1 to remove the "adapted to" language, and leave the claim with functional recitations: "a second array of visible light pixel elements responsive to selective to colors encountered while driving an automobile such that traffic control colors are optimally sensed." Functional language is specifically authorized by *In re Swinehart*, 439 F.2d 210, 169 USPQ 226 (CCPA 1971); *In re Caldwell*, 138 USPQ 243 (CCPA 1963); *Lewmar Marine, Inc. v. Barient, Inc.*, 827 F.2d 744, 3 USPQ2d 1766 (Fed. Cir. 1987 ("so that" functional clause of claim renders reference non-anticipating); MPEP § 2173.05(g). The reference to the pixel elements being responsive to selective colors, such that the traffic control colors are optimally sensed, is a recitation that helps define the structures and sets patentable boundaries as indicated in the examples provided in MPEP § 2173.05(g). Since the reference does not describe or suggest any type of optimization for such colors, the rejection should be withdrawn.

The Examiner appears to be stating that the missing disclosure from Faska et al. is inherent in Faska et al. Applicant respectfully disagrees because the Office Action has not established a *prima facie* case of inherency because, as recited in MPEP § 2112, "In relying upon the theory of inherency, the examiner must provide basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic necessarily flows from the teachings of the applied prior art," citing Ex parte Levy, 17 USPQ2d 1461, 1464 (Bd. Pat. App. & Inter. 1990) (emphasis in original). No such showing has been made. There is only a reference to it being an obvious matter or design choice. As previously indicated, such design choices appear to be improperly based on hindsight, using the present application as a roadmap.

Claim 9 was also amended to remove the language "adapted to". Claim 9 also specifically recites a heads up display. This element was not addressed in the Office Action. Since Faska et al. fails to show, teach or suggest such an element, the rejection should be withdrawn.

Claim 10 is a method that senses IR generally in the path of a vehicle, and also senses colors corresponding to traffic control colors. It also combines these to provide images for a heads up display. None of these features are taught by Faska et al. Just because a structure can be modified, and used in a certain manner, does not means that it is obvious to do so, absent

some teaching. Claims 11-12 depend from claim 10 and are believed allowable for at least the same reasons.

Claim 13 recites a method that is optimally selective to colors encountered while driving an automobile, which is not taught or suggested by Faska et al. Further, it is believed patentable for at least the same reasons as is claim 1.

Claims 2, 3, 5-8 and 14 were rejected under 35 USC § 103(a) as being unpatentable over Faska et al. and further in view of Yamakawa (U.S. Patent No. 5,929,432). Claims 2, 3, 5-6 and 14 are all dependent on an independent claim that is believed allowable. Yamakawa is not cited as teaching any of the elements missing from the reference used to reject such independent claims. Thus, the claims are believed allowable over this combination.

Claim 7 also optimally senses traffic control colors using a dual wavelength focal plane. Again, neither Faska et al. nor Yamakawa teaches or suggests such a device.

Claims 15-19 have been added, and are believed to distinguish the references for at least the same reasons as claim 1. In addition, such claims include a thermally isolating space, which is not believed to be shown in the references.

CONCLUSION

Applicant respectfully submits that the claims are in condition for allowance and notification to that effect is earnestly requested. The Examiner is invited to telephone Applicant's attorney at (612) 373-6972 to facilitate prosecution of this application.

If necessary, please charge any additional fees or credit overpayment to Deposit Account No. 19-0743.

Respectfully submitted,

ROLAND A. WOOD

By his Representatives,

SCHWEGMAN, LUNDBERG, WOESSNER & KLUTH, P.A.
P.O. Box 2938
Minneapolis, MN 55402
(612) 373-6972

Date 8-4-2003 By _____
Bradley A. Forrest
Reg. No. 30,837

CERTIFICATE UNDER 37 CFR 1.8: The undersigned hereby certifies that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail, in an envelope addressed to: Mail Stop RCE, Commissioner of Patents, P.O.Box 1450, Alexandria, VA 22313-1450, on this 4th day of August, 2003

_____ _____
Name Signature